SUBJECT: Defining a subterranean stream to exclude an aquifer

COMMITTEE: Natural Resources: favorable, with amendments

VOTE: 8 ayes — R. Lewis, Willy, Bosse, Greenberg, Haggerty, Hilderbran, Puente, Yost

0 nays

1 absent — Collazo

WITNESSES: For — Dan Byfield, Texas Farm Bureau; Russell Masters, Edwards Underground Water Conservation District; A. Maurice Rimkus. (Registered in support but did not testify — Oliver Martin, Aniceto Colunga and Jim Jenkins, Medina County Underground Water Conservation District; Donald E. Campsey, Medina County Commissioners Court; Bonnard Rothe; Judge E. Sandusky)

Against — None

On — Bill Couch, Barton Springs/Edwards Aquifer Underground Water Conservation District. (Registered but did not testify — Douglas Caroon, Texas Farm Bureau; Allan J. Lange, Lipan-Kickapoo Water Conservation District; Huber Payton, Irion County Water Conservation District)

BACKGROUND: Under current Texas law all underground water, with two exceptions, is presumed to be percolating groundwater, which belongs to the owner of the land overlying the water and may be used without limitation. The two exceptions, which — like surface water — belong to the state, are underflow of surface streams and subterranean streams.

The question of whether the Edwards Aquifer was an underground stream at the time its overlying land was granted is the subject of a suit brought in 1989 by the Guadalupe-Blanco River Authority (GBRA). If the Edwards Aquifer was an underground stream at that time, then its waters are today owned by the state in trust for the benefit of the public, and the Texas Water Commission would have regulatory authority. The suit is pending in Hays County district court.

Texas courts recently confirmed the established definition of subterranean streams, in *Denis v. Kickapoo Land Co.*, 771 S.W.2d 235 (Tex. App.-Austin (1989)), by using the same definition that all other western states use: "the subterranean water course must have all of the characteristics of surface water courses, such as beds, banks forming a channel and a current of water."

DIGEST:

HB 2329, as amended, would define a subterranean stream in the Water Code specifically to exclude an aquifer. It would define a subterranean stream as "possessing all of the characteristics of a surface watercourse, including a discrete and well-defined channel, with a bed and banks, that is capable of identification by a metes and bounds description." The bill would specify that the term would not include an underground reservoir or aquifer, even if there is water movement or if it discharges water through springs.

HB 2329 would add a category of water to the list of waters that are state property: the water flow of a *defined* subterranean stream.

HB 2329 also would add the same definition of subterranean stream to the Water Code chapter on underground water conservation districts.

SUPPORTERS SAY:

HB 2329 would simply codify common law regarding the definition of subterranean streams and make clear that the definition does not include aquifers. The legal characteristics included in the definition, such as a surface water course, are of long standing. Courts have looked to evidence of bed and banks, a current of water and a defined channel in deciding cases that claimed withdrawals from subterranean streams. Static aquifers are not classified as underground lakes nor should they be misrepresented as underground rivers.

HB 2329 incidentally addresses the pending GBRA suit; the Edwards Aquifer is clearly and foremost an aquifer, although it might have some characteristics of a subterranean stream. The GBRA suit names every person who has a well drawing water from the Edwards Aquifer, and the bill would help those property owners, some of whom have suffered financially from paying legal fees in the case. In defining subterranean stream, HB 2329 would prevent the financial repercussions of a frivolous lawsuit.

If a court declared the Edwards Aquifer, or any aquifer in the state, an underground stream, then purview would go to the Water Commission and water rights would be adjudicated on a permit basis. GBRA would receive most of the water rights, threatening the viability of agricultural interests in the Edwards Aquifer region.

OPPONENTS SAY:

This bill, which has statewide implications, attempts to legislate away the state's rights to the Edwards Aquifer and flies in the face of history and scientific reason. The proposed definition of subterranean stream differs substantially from the definition in effect in Texas and all other states for over 100 years.

HB 2329 would make two significant changes in the definition by requiring that an underground stream be capable of a metes and bounds description and by specifically excluding an underground reservoir or aquifer, even if there is water movement and it discharges water through springs. That change would define away all underground streams in Texas. Under the definition in the bill, if there is any storage component in an underground stream, then it could be argued that the underground stream is merely an underground reservoir with water movement. Most segments of surface streams in Texas have substantial storage capacity, and Texas water law does not separate these portions, but regards them all together as constituting one stream. Hydrological appraisal should come from scientific analysis, not imposed by the Legislature.

This bill would interfere with pending litigation over title to water in the Edwards Aquifer. The precise issue of defining a subterranean stream is currently before the state courts. Because this dispute relates to title to property, it is properly a judicial decision.

HB 2329 would be ineffective in its attempt to convey, without compensation, state-owned property. The issue in the Edwards Aquifer litigation is whether the Edwards Aquifer is an underground stream, and therefore state-owned, at the time the lands overlying the aquifer were conveyed. The only way the Legislature could alter the outcome of the current litigation is to explicitly grant to the overlying landowners title to state interests in the aquifer, which this bill would not do. While the Legislature could certainly convey whatever interests the state has in

Edwards Aquifer waters, that would be contrary to the state's interests. If the state does own the waters in the Edwards Aquifer, it should not give them away for nothing.

The state should keep all options open to avoid a federal takeover of the Edwards Aquifer. Last Friday, May 17, the Sierra Club filed suit in federal court under the Endangered Species Act, asking the court to order the U.S. Fish and Wildlife Service to regulate pumping in the Edwards Aquifer. If the courts decide that water in the Edwards Aquifer is state-owned, then the state could easily regulate withdrawals to protect springflows from the Comal and New Braunfels Springs, the two largest springs in the southwest United States. (Studies show that both springs will dry up for long periods of time in major droughts, unless pumping from the aquifer is regulated.) The Sierra Club hopes to have federal regulation of pumping to maintain the springflows and protect the endangered species that live at those springs, downstream and in the aquifer; this is the wrong time for the state to be surrendering any legal rights to the resource.

NOTES:

Committee amendment No. 1 would change a the word "from" to "through" in the part of the definition of relating to spring discharge. Amendment No. 2 would delete the underflow of a surface water course as part the new category of a defined subterranean stream, which is already included in the Water Code's definition of state water.